

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA Criminal Case No.
10-739M-11

v.

DANIEL CHOI,

Defendant,

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Washington, D.C.
Wednesday, August

31, 2011

2:00 P.M.

P.M. SESSION - DAY 3
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

AFTERNOON SESSION

THE COURTROOM DEPUTY: Recalling criminal case year 2010-739 M, United States of America versus Daniel Choi.

Angela George for the government. Robert Feldman and Norman E. Kent for the defendant. This is a bench trial, day three.

THE COURT: You may proceed.

MS. GEORGE: Your Honor, the government is requesting if the Court could indulge the government a little bit more. The Court was very patient with the government and explained or tried to explain to the government the issues regarding the selective prosecution and vindictive prosecution.

At this point in time, the government is going to ask a question of clarification at this point. Is the Court considering those subjects as a theory of defense, allowing the defense to proceed as if it is a theory of defense? Or will the Court consider a motion to dismiss at the end of the defense's case?

THE COURT: It is the Court's intention to permit the subpoena to issue and to consider what

objection if any the United States may make on behalf of entities subpoenaed. It is further the Court's intention to permit the defense and you to present whatever evidence you wish that is relevant to the issue as follows.

The issue presented by the testimony of the defendant yesterday in my view creates a prima facie case for the proposition that the difference in the manner in which he was prosecuted for his behavior in November as opposed to his behavior in March and April would permit the inference that that difference was a function of the nature of his speech or what he said.

It would then follow that the difference in treatment would (a) violate the due process clause because it is vindictive; and (b) independently constitute a violation of the First Amendment because it is predicated on his speech. I, therefore, will permit both sides to elicit evidence as to the difference in his treatment on those three occasions.

MS. GEORGE: Please tell me if I'm characterizing the Court's information improperly. So is the defense going to be allowed to pursue that

as a theory of defense?

THE COURT: Yes. It already has, the defendant has so testified. The defendant said you treated me differently as a function of what I said. That is, when I said X, Y and Z and behaved myself in a certain way, you treated me one way. When, in November, I did just about the same thing -- that is a question of dispute, but anyway prima facie -- he said, when I did the same thing, you treated me differently. The motivation for the difference in treatment had to do with what I said.

First, you violated my rights under the due process clause because you treated me differently without a legitimate justification that would stand analysis under the due process clause which, as far as the federal government goes, since the decision in *Bolling versus Sharp* includes equal protection.

So, the second thing he is saying is that your prosecution of me in November was vindictive. It was different. And there is no rational reason for you to do it.

I submit, he says, I submit that the real reason is, by then, you were offended by the nature

of what I was saying, by my speech. Therefore, by prosecuting me in a different way, you punish me for exercising my First Amendment right. Therefore, that is also a second violation of the Constitution of the United States.

MS. GEORGE: Your Honor, respectfully the government disagrees with the fact that the defense should be allowed to pursue that subject as a defense. Under United States versus Armstrong and a D.C. Circuit case -- Court's indulgence. U.S. versus Washington which also cites the United States versus Armstrong, the Supreme Court in that case states that selective prosecution and vindictive prosecution is similar, is not a theory of defense. It should not go to the merits of the case. And in that situation, it should be handled pretrial. As I mentioned earlier --

MR. KENT: May I reply, Your Honor?

THE COURT: No, you may not because I'd like to say, first of all, I am in this case wearing two hats that I always wear when I'm the finder of fact. I'm wearing the hat of the finder of fact, what happened here and have you established the

defendant's guilty beyond a reasonable doubt. I am also handling the legal hat on which I am compelled to rule on the issues of law that emerge.

There has arisen an issue of law. It involves the presentation of evidence so the record may be complete as to that issue of law. I don't understand how anyone is, how you in any way have been prejudiced since there is no jury present; whether I consider those issues now or later is of little moment.

Moreover, I have already invited you and counsel for the defendant to do supplemental briefs after the trial which of course may address the insufficiency of the defense.

But that issue ripens and becomes worthy of adjudication after there is a factual record developed.

MS. GEORGE: Your Honor, that's the very point, that the government is prejudiced at this point in time, given that the defense will be proceeding with a theory, proceeding with it as a theory of defense because the claim against the government is the government -- there was some

constitutional infirmity in the decision that the government made to prosecute the defendant.

We at this point in time must investigate whether that occurred, interview witnesses, find out the result of other prosecutions in order to present that evidence. Furthermore, the case law says that it should be done in a separate hearing. And if the Court concludes that that is the case, the case should be dismissed. If not, that's the situation. So the government disagrees with the Court with regard to its interpretation of the law, respectfully of course.

THE COURT: In the ordinary case where a jury is about to be impaneled, it would be good sense, consummate good sense that the issue of vindictive prosecution is treated beforehand because, obviously, if it is resolved in the defendant's favor, there is nothing to try.

Conversely, if the Court concludes there is a vindictive prosecution and doesn't permit the case to go forward, the government could appeal. In this case, it is true that we only became aware, you only became aware of the argument that would be made

either with your phone call with counsel for the defendant or which you spoke to in your motion.

By the same token, you could have at that point asked me, because selective prosecution was raised, to continue the proceeding so that issue could be addressed. But we all went forward. I don't know how else we could have done what we did.

MS. GEORGE: Your Honor, let me address a couple points the Court just made. First, for the record, the first time vindictive prosecution has been raised was today. In the phone call on August 25, 2011, where the Court and Mr. Feldman--

THE COURT: I readily concede that -- I don't know if question was raised. The question was sharpened at least in my mind. And I only began to understand the nature of the claim being made. When I heard the defendant's testimony, that sharpened in my mind what he was saying. And it was only then that I really began to understand that he was saying that there was a radical difference in the way I was treated. And that radical difference is a function, not of any justifiable reason, but of violations of my rights. So now we must address that issue.

MS. GEORGE: Yes, Your Honor. Just one more matter for the record.

The government preserved its position on the issue of selective prosecution when it filed a motion in limine. Mr. Feldman mentioned that in the August 25th phone call. Well, actually he didn't mention it. The Court summarized it for him.

Pursuant to that conversation, the government began to research the issue. Mr. Feldman or any of his defense counsel, Anne Wilcox, Mr. Goldstone, Mr. Feldman, Mr. Kent, Mr. Lynn, Ms. Kurland, no one has ever filed a written motion stating to the Court specifically what they are claiming.

THE COURT: I know but I cannot, I cannot, and perhaps -- I know of no other way to do it but to confront the issue that has arisen. I cannot pretend it did not arise. It did arise out of the witness' own mouth.

Let me ask you this. Do you wish me to stop what I'm doing so that you can seek mandamus?

MS. GEORGE: Yes, Your Honor. At this point, we are going to move to seek a Petition for Writ of Mandamus at this time and ask the Court to stay the

proceeding.

THE COURT: I will, in courtesy to the Court of Appeals, do that unless counsel gives me some reason. You appreciate that jeopardy has attached. Right?

MS. GEORGE: Yes, I do, Your Honor.

THE COURT: Now, if jeopardy has attached and, therefore, if you don't proceed and -- Well, let me ask you. You are going to seek mandamus. And if mandamus is denied, you are going to go forward or are you going to dismiss this action?

MS. GEORGE: Your Honor, I have not discussed this with my supervisors. But government believes we have sufficient evidence to prove the defendant guilty. So, without discussing it further, I would have to say no.

THE COURT: You may or may not. But what you cannot do is convict him in a manner that offends his constitutional rights. It is my job to figure out whether that has occurred.

MS. GEORGE: The government does not disagree with that, Your Honor. I think the government and the Court has a disagreement regarding how that

should be considered, and at what point in time.

THE COURT: This is for the Court of Appeals so it is none of my business. But so I understand your position, your position is going to be that I abused my discretion by what? Permitting the defendant to testify when I did not consider the question of selective prosecution prior to the trial, so you've lost your right to appeal from that determination?

MS. GEORGE: No, our position at this point in time is that the issue of selective prosecution or vindictive prosecution should be considered pretrial in a separate hearing and should be resolved after discovery is turned over. And if it is found that we selectively prosecuted the case, then it should be dismissed.

THE COURT: It should be dismissed if you -- so, you are not seeking that I dismiss it now, are you?

MS. GEORGE: No, the government is not requesting that.

THE COURT: Thank you, Ms. George.

Mr. Kent?

MR. KENT: I'll try to respond point by point. I just don't think Ms. George gets it. This Court has done nothing but allow the defendant a bite at the apple and an opportunity to present either selective prosecution or vindictive prosecution as a defense. You have done nothing more than allow us to elicit testimony from the witnesses that might be illustrative of us making such a claim.

That is all the Court has done thus far. And as a consequence, the U.S. Attorney has interrupted this trial process for an hour for an extended discussion with her superiors. And then come back again and argued with the Court again, saying you are wrong, you are wrong, you are wrong.

It almost creates, when we do write this supplemental brief, an argument for the defense to advocate the position from Shakespearian law that: me thinks he doest protest too much. That the government is so obsessed about inhibiting the defendant's expressive rights to even advocate a defense that they don't even want to let you argue it.

She is asking now for a petition for a Writ

of Mandamus, suspend the proceedings so she can appeal an interlocutory ruling of the United States Magistrate. I don't think any Court of Appeals will allow it.

THE COURT: Let's take first things first. Do we all agree that in courtesy to the Court of Appeals I should suspend so she can file the Writ, or are you gentlemen saying jeopardy having attached, I should dismiss this case if she's--

MR. KENT: She just said I haven't had a chance to discuss--

THE COURT: Why don't I do this? Would you please take 10 minutes to talk so he understands what you just said.

MR. KENT: Thank you, Your Honor. That is what she is asking for. She is asking to suspend the proceedings to go to the Court of Appeals.

MR. FELDMAN: 48(b) of the criminal rules, you can consider at your leisure and your break, please. Thank you, sir.

THE COURT: Thank you.

(A brief recess was taken.)

THE COURT: Have you had an opportunity talk

with your client?

MR. KENT: Your Honor, it is the defendant's position that what the government is seeking essentially is a non-file appeal of the trial order of the United States District Court Magistrate after double jeopardy has attached as to the defendant when and where the defendant's lawyers have encumbered enormous expense and time in traveling from New York and Florida to try this case. And there is nothing about the judge's ruling that is so inhibitive or prejudicial to the prosecution that it would impede its ability to complete this case.

And we do not want any delay because as to the defendant himself, who is the person on trial, whose constitutional rights are afforded and the ones we most need to protect, he has an application for readmission to the United States military that may be resolved as soon as September 20. So we don't abide by the government's request. We humbly respect whatever Court order, whatever the Court wants to do, of course we'll abide by it obviously. And we just don't want to put on the record that we stipulate to anything the government is asking for and Mr. Feldman

wants to add--

MR. FELDMAN: Mr. Feldman is talking now, with the Court's permission. We don't waive 48(b)3.

MR. KENT: And we defer to the Court.

THE COURT: All right.

Ms. George. What is your position?

MS. GEORGE: Your Honor, the government would like to clarify what the Court stated earlier. The Court stated --

THE COURT: Why do I need you to clarify me? If you want to clarify what you said, that's fine. But I find it somewhat insulting that you are clarifying what I've said.

Ms. George, I have made every effort to be as clear as humanly possible. What was unclear about what I have said? You fish or you cut bait. You want to take mandamus, say so.

MS. GEORGE: Your Honor, we just to be clear, we just want the record to be clear what the Court's intention is with regard to the procedures and this issue and the case.

THE COURT: Please speak to it.

MS. GEORGE: Okay. I just want to know if

the Court is considering the issue of selective prosecution/vindictive prosecution as a theory of the defense or will the Court--

THE COURT: I decline to answer that question on the ground that I have answered it innumerable times. I have explained to you -- once again, the defendant during his testimony yesterday explained to us that he did engage in certain behavior in March. He engaged in similar behavior in April. He engaged in what he believed was similar behavior in November. In March and April he was treated in a certain way. In November, he was treated much more harshly in his view and he insists that that was done vindictively. It was done to single him out and to punish him for the exercise of his First Amendment rights.

That is not selective prosecution in the traditional way. But is articulated by reference to the Fifth and 14th Amendments where there is an issue whether there is a different treatment among people who fall within a protected class. So that all the people who are of a particular race are treated one way and all the people of a different race are treated another way is a more subtle application of

the principles of equality of treatment guaranteed by the Fifth Amendment.

Under that principle, it is impermissible for the United States to differentiate among people and the manner in which it prosecutes them on the basis of the speech they have stated.

The defendant's position is: I said something in March, I said something in April and I said something in November. The reason I was treated in November differently from the March and April is, by November, I began to offend the United States by what I was saying to the point that they treated me differently; and therefore, my rights under the First Amendment and the Fifth Amendment were violated.

Now whether you call that selective prosecution or vindictive prosecution or Bermuda onions is of little moment to me. What I've tried to do is articulate the constitutional basis that underlies the defense. And that constitutional basis is that it is impermissible for the Government of the United States to treat people differently on the basis of what they have said.

MS. GEORGE: Yes. And the government

understands the gravement of the issue. The government is trying to ascertain the procedures that the Court is going to employ in order to resolve the issue.

THE COURT: Here is where I think we are. If you do not wish to go forward, the defendant is going to move under Rule 48 that there has been an unnecessary delay in this prosecution, that jeopardizes him. I will hear both parties at that motion.

If that motion is denied, I will be obliged, I believe in courtesy to the Court of Appeals, to continue this matter for a certain number of days to permit you to perfect a Writ of Mandamus to the Court of Appeals.

Now, on the question presented I think is, I'll hear counsel as to this. As I understand, Mr. Kent, your position is that jeopardy has attached. And the defendant, having commenced the trial, is entitled to have it completed.

MR. KENT: I'm sure even the Court would agree on that, that the trial has commenced. I think it goes without stating that the Court is acting in a

dual capacity. Having been a traffic judge for 10 years, I know what that is like. I have to elicit the facts from the witnesses but I also have to be a finder of fact. And jeopardy has attached, absolutely, that's our position. The first witness has been sworn in.

THE COURT: There is no question, I don't think anybody in their right mind could suggest that jeopardy is not attached. Of course it is. But your position is to move to dismiss?

MR. KENT: Yes.

THE COURT: Let's hear Ms. George as to that.

Ms. George, a motion has been made to dismiss on the grounds that there has been an unnecessary delay in the conclusion of this matter under Rule 48(b) of the Rules of Criminal Procedure.

MS. GEORGE: Your Honor, the government is not moving to dismiss the case.

THE COURT: No, they are.

MS. GEORGE: The government would oppose a dismissal at this time and proceed with the petition--

THE COURT: Just a question of neatness, I

don't know how your position is affected whether or not I dismiss it. You still have mandamus. And the abuse of discretion would be to dismiss it so the Court of Appeals would then reinstate the prosecution. And then I supposed the issue of jeopardy would attach.

But if the Court of Appeals, if you take me up on mandamus and you say Facciola abused his discretion and committed reversible error by permitting the lieutenant to assert a defense on the witness stand and not resolving it prior to trial pursuant to a motion in limine, and I have dismissed the matter, your prayer for relief will be, would not be to reinstate the prosecution and we would begin where we left off; is that right?

MS. GEORGE: Yes, not considering vindictive prosecution --

THE COURT: Does it make any difference whether or not I dismiss? I don't see the difference. Am I missing something?

MS. GEORGE: Well, the government can't appeal a dismissal at this point in time, Your Honor.

THE COURT: But if Facciola were, over your

objection, to dismiss it, that would also be subject to mandamus, wouldn't it? It just makes for somewhat cleaner record from your point of view, doesn't it?

MS. GEORGE: No, a dismissal, if I'm incorrect, Your Honor, I'm incorrect. I believe that's a final order . So that we would not be able to appeal at this point in time. But right now, there is no final order.

THE COURT: That's the point. You are not taking your appeal. You are taking mandamus which is an extraordinary writ. You are saying Facciola's dismissal was error; and it was error because the ground he gave, that we had not concluded the case without a necessary day was error. He made that error because he occasioned the error by permitting the defense to raise a claim of vindictive prosecution at the trial. So mandamus, it seems to me, speaks to both of the things I did. It may not amount to a hill of beans but I just want to say I'm not so certain I see the big difference. Correct me if I'm wrong.

MS. GEORGE: The mandamus, Your Honor, is related to the fact that the government disagrees

with the Court regarding an issue of law. So at this point in time, there is no final order in reference to that. So, that the motion to dismiss should be considered after that point in time.

THE COURT: I will deny the motion to dismiss which will also give Lt. Choi an equal right to mandamus because he will claim that jeopardy has attached and that makes for a neater record. I will as a courtesy to the Court of Appeals continue this matter for 10 days within which for you seek your writ of mandamus.

MS. GEORGE: Thank you, Your Honor.

THE COURT: That's over the defendant's objection, over Lt. Choi's application.

All right. Does everybody have the record they want?

MR. FELDMAN: Yes, Your Honor, thank you.

MR. KENT: The defense will supplement its motion to dismiss with our written motion.

THE COURT: The minute she files that petition, I'm afraid I lose jurisdiction over the subject matter so we'll have to play--

MR. KENT: But as I understand the Court's

ruling, it is giving the United States 10 days to file its petition for Writ of Mandamus. At which time, the court trial is now suspended and all witnesses may be excused.

THE COURT: Yes, we're in that status. I suspect, I supposed, well let's see what happens. In those 10 days, they don't file a Petition for Mandamus, we'll go from there.

MR. KENT: Thank you, Your Honor.

MR. FELDMAN: Good evening, Sir.

THE COURT: Thank you.

I just want to thank everybody on the record for their excellent presentations. It has been an honor to preside over this case.

MR. FELDMAN: The honor is ours, Your Honor.
(Whereupon, at 2:36 P.M., the hearing concluded.)

CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the foregoing
is a correct transcript from the record of
proceedings in the above-entitled matter.

Lisa Walker Griffith, RPR

Date